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SUPREME COURT, U. S.

No. 239 [redacted]

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

VINCENT COLLETTI and SMILE GUAJARDO,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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Petitioners, Vincent Colletti and Smile Guajardo, pray that a Writ of Certiorari be issued to review the judgment of the Appellate Court of Illinois, Second District, affirming a judgment of the Circuit Court of DuPage County, Illinois, convicting them of robbery and burglary.

Opinion Below

The opinion of the Appellate Court of Illinois, Second District, is reported in 101 Ill. App. 2d 51, 242 N.E. 2d 63, and is reprinted herein as Appendix A.

Jurisdiction of this Court

The judgment of the Illinois Appellate Court, Second District, was rendered on November 8, 1968. A timely Petition for Leave to Appeal to the Supreme Court of Illinois was denied on March 25, 1969. This Petition is filed within 90 days of said order.

The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1257(3).

Statutory Provisions Involved

Illinois Criminal Code, Sec. 112-6, Chap. 38; Ill. Rev. Stat. 1965:

> "Only the State's Attorney, his reporter and any other person authorized by the court may attend the sessions of the Grand Jury. Only the grand jurors shall be present during the deliberations and vote of the Grand Jury. If no reporter is assigned by the State's Attorney to attend the sessions of the Grand Jury, the court, on petition of the foreman and eleven other grand jurors, may for good cause appoint such reporter."

Questions Presented

1. Is not the deliberate policy of the State's Attorney not to record, transcribe or preserve Grand Jury testimony a suppression by the prosecutor of evidence favorable to a defendant? Is not the prosecutor violating and therefore frustrating the holdings by this court in *Brady*

v. *Maryland,* 373 U.S. 83 (1963), *Giles* v. *Maryland,* 386 U.S. 66 (1967) and *Dennis* v. *United States,* 384 U.S. 855 (1966)?

2. Should not petitioner Colletti have been granted a severance from his co-defendant Guajardo when post-arrest statements of Guarjardo implicative of Colletti were permitted, over Colletti's objections, to be considered by the jury in violation of *Bruton* v. *United States,* 352 U.S. 232 (1968)?

Statement of the Case

With respect to the Grand Jury minutes

Prior to trial, petitioners moved for the production of the Grand Jury minutes of the seven witnesses who apparently testified before the Grand Jury. The prosecutor stated, "The State at this time would like to make an announcement that there was no court reporter present or any tape recording device at the Grand Jury." (26)[1]

Petitioners moved to dismiss the indictment, pointing out that since the State's Attorney of DuPage County was held in contempt of court for refusing to turn over the Grand Jury minutes upon another trial judge's demand that "There is a deliberate and steady practice, rule and order of the State's Attorney of DuPage County, not to transcribe the minutes of the Grand Jury proceedings for the purpose solely and only to frustrate the defense from requesting those Grand Jury minutes for the purpose of impeachment at the time when defense counsel is entitled to them" (30). Petitioners made an offer to prove that such was the deliberate and official

[1] Parenthetical number references are to the Transcript of Proceedings filed with this court.

practice of the State's Attorney of Du Page County to the effect that there was an order and direction that the Grand Jury minutes not be written up. On that basis, petitioners moved for dismissal of the indictment because the State's Attorney ". . . is deliberately obstructing the defense in having all relevant evidence present at the trial of the facts under consideration . . ." The motion was denied (34).

The Appellate Court's opinion states, "The State does not contest the sufficiency of defendants' offer of proof . . ." (App. A, p. 6a).

Testimony at Trial Pertinent to Issue

The complaining witness, Nora Birdsong, was robbed and her home burglarized. She testified money was taken from a living room table and that a diamond ring and portable radio also were taken (102-113). Guarjardo, who was found in the house, had no ring, money or portable radio on his person. Colletti, who was arrested some distance from the home, had no ring or radio on his person, nor was any found outside the house or in the immediate vicinity thereof (196-7).

Mrs. Birdsong had testified before the Grand Jury, and in addition, had made a report to a banker wherein she stated that a radio and diamond ring were missing (105-110).

The Post-Arrest Statement of Guajardo

At first, the court sustained petitioner Colletti's objections to questions by Guajardo's attorney asked of the State's witness, police chief Kagann, with respect to post-arrest statements of Guajardo (208).

Later in the trial the court stated, "On further reflection, I am going to overrule myself . . ." (295).

Over objections of Colletti and over his motions for a severance (299), counsel for Guajardo asked officer Kagann for the conversation they had after Guajardo's arrest. Kagann answered, "He [Guarjardo] stated that he was walking along the street and saw a man run out of the house. He went into the house to see what was wrong." (299).

Petitioner Colletti moved for a mistrial; that being denied, he moved for a severance, which was also denied (299-300).

Reasons For Granting The Writ

1.

The prosecutor's suppression of evidence possibly favorable to petitioners.

Although the law in Illinois does not require that the testimony of witnesses before a grand jury be recorded, Section 112-6, Chap. 38, Ill. Rev. Stat. 1965, *People* v. *Aughinbaugh*, 223 N.E. 2d 117, 120, *People* v. *Derengowski*, 213 N.E. 2d 618, 619, we submit that under the circumstances of the case here and because of a deliberate policy set by the State's Attorney of DuPage County not to preserve grand jury minutes, the defendants' constitutional right to a fair trial in accordance with due process of law was violated.

In advance of trial, the defendants moved for the production of the grand jury minutes of the witnesses whose names were endorsed on the back of the indictment. The assistant State's Attorney announced that, " . . . There was no court reporter present or any tape recording device at the grand jury." (26). The defendants requested a hearing in order to present evidence on the deliberate practice of the State's Attorney not to have court reporters present in order to obstruct defendants from obtaining the grand jury minutes for such use as they might provide defendants. The motion was denied (28). Counsel for defendants then pointed out that since the Appellate Court's decision (*People* v. *French*, *People* v. *Hopf*, 61 Ill. App. 2d 439, 209 N.E. 2d 505, Aug. 4, 1965) that

> "There is a deliberate and steady practice, rule and order of the State's Attorney of DuPage County, not to transcribe the minutes of the grand jury proceedings for the purpose solely and only to frustrate the defense from requesting those grand jury minutes for the purpose of impeachment at the time when defense counsel is entitled to them." (30).

Counsel then made an offer that he was prepared to prove by presentation of evidence that it was such a deliberate practice of the State's Attorney of Du Page County and that the State was withholding evidence needed for the purpose of impeachment. Defense made an offer of proof that, "The County of DuPage, through its State's Attorney, the official prosecuting body, is deliberately obstructing the defendant in having all relevant evidence presented at the trial of the facts under consideration, and we move for a dismissal of the indictment." (34)

There are situations in which deliberately withholding grand jury testimony of a witness violates the defendant's right to full disclosure. The facts and circumstances here markedly point up how the defendants were prejudiced by the deliberate withholding of Mrs. Birdsong's grand jury testimony. Cf. *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Giles* v. *Maryland,* 386 U.S. 66 (1967), and *Dennis* v. *United States,* 384 U.S. 855 (1966). In *Brady* v. *Maryland,* this Court stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (373 U.S. 87).

The bizarre circumstances of the case here called for a searching inquiry and examination of Mrs. Birdsong's testimony. Her home was burglarized and she was robbed. The question was whether the defendants were the robbers. Mrs. Birdsong testified that money was taken from a living room table and that also missing were a ring and a portable radio (102-113). Guajardo, who was found in the house, had no ring or portable radio on his person (A. 7). Nor was any found in the living room where Guajardo was arrested (204-5). Colletti, who was arrested some distance from the home was immediately searched; no ring or radio was found on his person (196-7). Neither was any found outside the house or in the immediate vicinity (196-7).

It was Guajardo's defense that he was walking by the house and simply went in to see what was wrong when he saw a man run out of the house (299).

In addition, the victim, Mrs. Birdsong, testified that one of the men had on rather large sunglasses (85). Neither of the defendants had sunglasses on them, nor was any pair of sunglasses found in the living room or outside, even though a thorough search was made (351-2). So far as Colletti is concerned, the bills and coins found on him were explainable by virtue of his operating a mobile catering truck which sold sandwiches and coffee to factory and construction workers (203). There was construction going on immediately behind Mrs. Birdsong's home, and about 8 or 10 construction workers were at the scene (240-245).

There were also pronounced discrepancies in the size of the men who were the robbers and of the defendants. Mrs. Birdsong testified one man was taller than the other (85-7); but the defendants were the same height (239).

Under such questionable circumstances as here then, it was extremely vital to know what Mrs. Birdsong said when she appeared before the grand jury with respect to her missing ring and transistor radio. For, if before the grand jury she testified that robbers took her ring and transistor radio, the men had to be other than the defendants. Or at least there could have been an arguable presentation made to the jury — sufficient to cast doubt upon the guilt of the defendants.

Thus, the grand jury testimony of Mrs. Birdsong was vital, not only to ascertain what she reported as lost at the time of the robbery, but what descriptions she gave of the robbers. Although her trial testimony cast doubt upon the identification of the defendants—or at least one of them—as being the robbers (because one robber was taller than the other and both defendants were almost identical in size) it might have proved significant precisely what her description was before the grand jury.

Having demonstrated the nature and extent of the possible impeachment of Mrs. Birdsong had her grand jury minutes been produced, petitioners were prejudiced. Due process of law includes an opportunity to introduce evidence on all issues to be determined. *In re Oliver*, 333 U.S. 257, 273 (1948).

This court should note that peculiar and especial circumstances exist in DuPage County, Illinois. The State's Attorney was cited for contempt for failure to produce Grand Jury minutes in response to an order of court. (*People* v. *Hopf*, 61 Ill.App.2d 439). Although the contempt conviction was reversed because the court held the necessity for production of grand jury minutes was premature, it was then decided by State's Attorney Hopf that his office would affirmatively prevent defendant ever from having access to possible impeachment material.

Under the specific facts of this case, we have demonstrated how vital the grand jury testimony of Mrs. Birdsong was. What she told the grand jury about the theft of her personal property is highly relevant to the case and might have provided considerable material for use on cross examination.

In another context, we submit it is a dangerous practice for the prosecuting official of a county deliberately to prevent any recording or reporting of grand jury testimony. We respectfully suggest that situations will arise whereby the administration of criminal justice will be impeded. How will a prosecutor proceed against witnesses who may recant their sworn grand jury testimony? How will the State's Attorney be able to bring perjury charges against witnesses? These are matters of vital public policy which transcend the particular practices now engaged in by the temporary occupant of the State's Attorney's office in DuPage County, and transcend the limited application of the claimed prejudice to the defendants at bar.

Should the criminal prosecution be a sporting event or a quest for the truth?[2]

Where, as here, there is a showing of the nature and extent of the possible impeachment of which might or could have resulted from an examination of the grand jury proceedings, petitioners were prejudiced in that right.

The Illinois Appellate Court stated that in avoiding preserving grand jury minutes that the State's Attorney's ". . . purpose in doing so may be indeed to avoid the necessity of producing transcripts of Grand Jury testi-

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[2] See "The Criminal Prosecution: Sporting event or Quest for Truth?" by William J. Brennan, Jr. Washington University Law Quarterly, June, 1963, pp. 279-295.

mony for impeachment purposes at the trial" (App. A, p. 6a). But it ruled that the State's Attorney's motives in failing to preserve Grand Jury testimony was unimportant (App. A, p. 6a).

Deliberate withholding of evidence favorable to a defendant is an important motive in determining the essentials of a fair trial.

2.

Colletti's right to confrontation of witnesses under the Sixth Amendment was violated when his co-defendant's post-arrest statement was permitted in evidence against him over his objections.

In referring to the cross-examination of Chief of Police Kagann by Guajardo's lawyer wherein incriminatory matters against Colletti were elicited over objections by Colletti's counsel, the Appellate Court stated, "Colletti correctly points out that this evidence was improperly admitted" (App. A, p. 3a). Guajardo's post-arrest statement was to the effect that he saw someone run out of the house. That statement was corroborative of other State's witnesses who saw someone run out of the house and saw a policeman chase a man who appeared to be Colletti. Colletti was arrested, but denied he ran out of the house.

The Appellate Court stated, "Here, we would be particularly disposed to reverse the conviction of Colletti if we felt that he had been prejudiced by the hearsay testimony" (App. A, p. 4a). Then the Appellate Court went on to state it could not see how Colletti could be prejudiced by Guarjardo's statement, because it did not see how the jury "could have concluded that Colletti was the person referred to by Guajardo." (App. A, p. 4a). Yet the reviewing court stated that Colletti could not be prejudiced because ". . . the uncontradicted evidence indicates

that Guajardo was already in the house before Colletti ran out." (App. A, p. 4a). The two statements by the court seem to be contradictory.

There was testimony in the record that when Colletti was questioned, he explained the presence of the small change on his person by virtue of the fact that he operated a sandwich and coffee business from a trailer. The police verified that he was so employed by having made telephone calls to his employer (203). There were workmen in the area, as houses were being constructed (240-243).

Thus, Guajardo's testimony corroborated the testimony of Mrs. Erickson and that of Mrs. Dixon, two of the other State's witnesses.

For the court to speculate that the jury would give no consideration to Guajardo's exculpatory statements incriminating Colletti is unrealistic speculation, and is further speculation in a realm about which no one knows. The subtle nuances by which a jury may conclude certain evidence important or otherwise is known only to the subjective processes of jurors.

The Appellate Court distinguished *Bruton* v. *United States,* 391 U.S. 123 because there the prosecution elicited the prejudicial testimony against the co-defendant (App. A, p. 5a). To a prejudiced defendant who moved for severance before the trial, who objected to the testimony during the trial, and who moved for severance during the trial, it makes little difference from which source the tainted and impermissible evidence comes. He becomes prejudiced by virtue of the admittance into evidence, over his objections, of testimony which was contrary to his post-arrest statement to the police.

In *DeLuna* v. *United States,* 5 Cir., 308 F.2d 140 (1962), a conviction was reversed because one defendant's lawyer argued to the jury that although his defendant took the

witness stand, another defendant, DeLuna, did not. And in *DeLuna,* the court even stated that no instruction could undo the prejudicial effect of the reference to DeLuna's silence. We call to the court's attention that here we had asked the trial judge for severance and for a mistrial (299-300). *There was no instruction by the court to disregard the statement as to Colletti.* As *DeLuna* stated in reversing—even though it was not the government prosecutor who injected the prejudicial comments—

> "But considering the head-on collision between the two defendants, the repetition of the comments, and the extended colloquy over the comments between trial judge and the lawyers, the imputation of guilt to DeLuna was magnified to such an extent that it seems unrealistic to think any instruction to the jury could undo the prejudicial effects of the reference to DeLuna's silence. The seed of inference was so well planted, it is fair to assume that it germinated.
>
> In short, for each of the defendants to see the face of Justice they must be tried separately." (pp. 154-155)

This trial was not overly long, two days, including the selection of the jury. The State would not have been unduly burdened had a severance been granted. Justice and fairness demand that he be given that separate trial.

Conclusion

Wherefore, petitioners pray that this court's Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Appellate Court

MR. JUSTICE MORAN delivered the Opinion of the Court:

The defendants were convicted on both counts of an indictment charging them with the robbery of Nora Birdsong, and with the crime of burglary, in that they entered her home with intent to commit a felony. The case was tried to a jury. Colletti was sentenced to a term of 6 to 15 years, and Guajardo to a term of 9 to 18 years. The appeal was transferred here by our Supreme Court on the ground that no substantial constitutional question is involved.

Upon appeal, the defendant Colletti only contends that the court erred in refusing him a severance, and we will discuss the evidence to the extent necessary to dispose of that point.

Mrs. Nora Birdsong, who resided alone in Woodridge, was employed as a waitress and, on the night of May 24, 1966, earned about $27.00 in tips. When she returned home that night, she placed this money on her kitchen table. According to her testimony, it consisted of about $6.00 or $8.00 in quarters, a few nickles and dimes, and the rest was in bills.

She awoke at about 9:00 A.M. the next morning and started to make a pot of coffee. She heard her rear door bell ring, and then a man entered the rear door, brandishing a pistol. The man tied her up and took her to the bedroom, where he pushed her onto the bed and told her to keep quiet. After that, she heard noises all over the house, like the sound of drawers slamming, and she also heard mumbling. She was unable to tell how many voices there were. She began to moan, and she heard a voice say, "Go

in there and shut her up . . .," whereupon a man appeared at the bedroom door. This was not the same man she had seen earlier.

When she was alone again, Mrs. Birdsong managed to free her hands and called the telephone operator and reported that a robbery was in progress. The operator then relayed the information to the police, and two squad cars arrived on the scene within a few minutes. One car was driven by Joel Kagann, the Chief of Police of Woodridge and the other was driven by Officer George Zima of the Woodridge Police Department. Chief Kagann entered the front door of the house, while Officer Zima went around to the rear. Kagann found clothing and other items strewn about the floor of the house, and observed the defendant Guajardo standing near the television set with something in his hand. Guajardo dropped what he had in his hand and started moving toward the television set. There was a gun on top of the television set. Kagann said, "Freeze, Police Officer," whereupon Guajardo stood still. As Chief Kagann entered the house he heard Officer Zima yell, "Hold it, Police Officer." Zima later appeared with the defendant Colletti in custody. Zima testified that, when he rounded the house, he saw the defendant Colletti running from the direction of the back door. When Colletti was searched, the pocket of his sweater was found to contain $27.60, consisting of $6.25 in quarters, a few nickles and dimes, and the remainder in bills. He also had $120.00 in his wallet and $4.50 in his right pants pocket.

Mrs. Birdsong was unable to identify either of the defendants. Mrs. Irene Erickson, who lived about a block from the Birdsong house, testified that, at the time the two police cars pulled up to the house, she saw a man running out the back door of the Birdsong house. She said that she had this man in sight until he was apprehended by the

policeman who went around to the back of the house. Her testimony was corroborated by Mrs. Elizabeth Dickson, who was visiting Mrs. Erickson at the time. The only important difference in their testimony is that Mrs. Dickson said the man was blocked from their sight for a few moments between the time he came out the back door and the time he was apprehended by the police officer.

Neither of the defendants testified.

With this factual background, we come to the first assignment of error, which is the defendant Colletti's contention that his pretrial motion for severance should have been granted. The motion was made at the time the case was called for trial, at which time counsel for Colletti informed the court that the defendant Guajardo had made "exculpatory statements" to the police at the time of his arrest, which statements would not be admissible against Colletti, and that therefore a severance should be granted. The court denied the motion.

At the trial, it was not the State which introduced the evidence of Guajardo's statement. Rather, it was counsel for Guajardo who, on cross-examination of Chief Kagann, elicited, over the objection of Colletti, the information that, after his arrest, when asked what he had been doing in the Birdsong home, Guajardo stated that he had been walking along the street and saw a man run out of the back door of the house, whereupon he "went into the house to see what was wrong."

Colletti correctly points out that this evidence was improperly admitted. The statements made by a party are frequently admitted in evidence when offered by his opponent, because the hearsay rule does not apply in that instance. However, the hearsay rule does preclude a party from proving his own self-serving statements. It is not

claimed that the statement was made as part of the *res gestae*. Statements made out of court by a party opponent, when offered against him are admissible as an admission; however, when offered in his favor they are not admissions and become grounds for objection under the hearsay rule (4 Wigmore on Evidence, Sec. 1048, pp. 2-4 (3rd Ed. 1940)) See also, *The People* v. *Kosearas*, 410 Ill. 456, 459 (1951); The People v. Jones, 26 Ill. 2d 300, 305 (1962). Thus, even if Guajardo had been on trial alone, he would not have been entitled to introduce this testimony.

Here, we would be particularly disposed to reverse the conviction of Colletti if we felt that he had been prejudiced by the hearsay testimony. However, we agree with the State that Colletti was not prejudiced by it. The exculpatory statement of Guajardo did not, in our opinion, incriminate Colletti. If it had, we would reverse Colletti's conviction—not because his motion for a severance was denied, but because the evidence was improperly admitted over his objection. However, we fail to see how Colletti could have been prejudiced by the statement of Guajardo that he had entered the house because he had seen a man running from the rear door, when the uncontradicted evidence indicates that Guajardo was already in the house before Colletti ran out. If the jury had given any weight to the hearsay statement attributed to Guajardo, they might have concluded that there was a third person involved, but we do not see how they could have concluded that Colletti was the person referred to by Guajardo. On this appeal, Colletti does not specify the manner in which he feels he was prejudiced by the hearsay testimony. His only argument on the point is that "by the impermissible testimony of Colletti's co-defendant, the State's witnesses were, in a manner, corroborated." We do not see how Guajardo's statement does in fact corroborate the State's witnesses, and, since Colletti has given no other indication

as to how he might have been prejudiced by the improper testimony, we hold that its admission did not constitute reversible error.

It is argued that the recent decisions of *Bruton* v. *United States,* 391 U.S. 123, 88 S.Ct. 1620, 1628 (1968) and *The People* v. *Miller,* 40 Ill. 2d 154, 158-159 (1968) should be sole authority for the reversal of Colletti's conviction. We are of the opinion that both of these cases are distinguishable on their facts from the case at bar. In both the *Bruton* case and the *Miller* case the testimony was elicited by the State on examination and directly named the co-defendant. In the case at bar, the alleged erroneous testimony was elicited by Guajardo's counsel and did not name Colletti as the man running from the rear door. As already stated, "a man" referred to by Guajardo in his statement could not be Colletti.

The remaining assignment of error is urged by both defendants. They moved, prior to trial, for the production of transcripts of the witnesses who testified before the Grand Jury which indicted them. The State's Attorney stated that no court reporter had been present at the Grand Jury proceeding, and that no other kind of recording device had been used, so that there was no record of the testimony given before the Grand Jury. The defendants then requested the court to hold a hearing, at which they would have the opportunity to prove that the State's Attorney of DuPage County made it a practice not to have court reporters present at Grand Jury proceedings, and that the sole reason for this practice was to deprive defendants of an opportunity to have access to Grand Jury testimony for impeachment purposes. The defendants also moved to dismiss the indictment on the ground that they had been deprived of an opportunity to know what had been said before the Grand Jury. The court denied both motions.

On this appeal, defendants take the position that the policy of the State's Attorney, which they offered to prove, constitutes a denial of their Constitutional right to due process of law.

The State does not contest the sufficiency of defendants' offer of proof, so we are not called upon to decide whether the record is sufficient in this regard. In any case, we prefer to pass upon the merits of defendants' contention, based upon the assumption that there may indeed be a policy of the State's Attorney to dispense with court reporters before the Grand Jury, and that his purpose in doing so may indeed be to avoid the necessity of producing transcripts of Grand Jury testimony for impeachment purposes at the trial. We also lay to one side the question of whether the pre-trial motion was premature, *People* v. *French*, 61 Ill. App. 2d 439, 446 (1965), because the defendants also moved for production of the witnesses' Grand Jury testimony after the witnesses testified during the trial, and moved for a directed verdict of acquittal based upon the inability of the State to produce it.

The basic question is whether the State has a duty to insure that the testimony of witnesses before the Grand Jury will be recorded for the later use of the defendant. It is clear that no such duty exists. *The People* v. *Aughinbaugh*, 36 Ill. 2d 320, 324-325 (1967). Accordingly, it makes no difference what the motive of the State's Attorney was in not having the testimony recorded.

The theory advanced by the defendants would create impossible problems of administration, and we think it is worthwhile to point out a few that occur to us. Every time the State called a witness whose Grand Jury testimony had not been recorded, an inquiry would have to be held as to the "motive" of the prosecutor in not having had a reporter present. Then, assuming that the prosecu-

tion did have transcripts of the testimony of all witnesses who did appear before the Grand Jury, we suppose the next inquiry would be why some witnesses appearing at the trial did *not* testify before the Grand Jury. Was it because the State did not want their testimony recorded? The field of inquiry suggested by the defendant would go, of course, beyond the matter of Grand Jury testimony. The rule that a defendant is entitled to Grand Jury testimony if it is available, (*The People* v. *Johnson,* 31 Ill. 2d 602, 606 (1964) is, after all, simply an extension of the rule that statements of witnesses in the possession of the prosecution must be turned over to the defendants for impeachment purposes. *The People* v. *Moses,* 11 Ill. 2d 84, 89 (1957); *The People* v. *Wolff,* 19 Ill. 2d 318, 327 (1960). If we were to adopt the position urged by the defendants in connection with Grand Jury testimony, it would necessarily follow that the "motive" of every policeman in failing to take a written statement of a prospective prosecution witness would be a legitimate subject of inquiry when the witness later testified.

We will not pursue this train of thought any further, because it must inevitably lead to a Kafka-like dream in which police departments and prosecutors' offices become mere clerical centers for the recording and transcription of witnesses' statements to be turned over to the defense. The *Moses-Wolff* rule stops somewhere, and it stops considerably short of that.

The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Davis and Seidenfeld, J.J.—Concur

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 239

VINCENT COLLETTI and SMILE GUAJARDO,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ of Certiorari To The Appellate Court of Illinois, Second District)

BRIEF AND ARGUMENT FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 239

VINCENT COLLETTI and SMILE GUAJARDO,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ of Certiorari To The Appellate Court of Illinois, Second District)

BRIEF AND ARGUMENT FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported in 101 Ill. App. 2d 51, 242 N.E.2d 63, and is accurately reproduced in Appendix A to the Petition.

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the Petition.

STATUTORY PROVISIONS INVOLVED

The Statutory Provisions are set out in the Petition.

QUESTIONS PRESENTED

1. Whether the State is obliged to transcribe the testimony of all witnesses appearing before a Grand Jury?

2. Whether petitioner Colletti was prejudiced by admission into evidence of an exculpatory, self-serving post-arrest statement made by petitioner Guajardo which did not refer in any way to Colletti?

STATEMENT OF THE CASE

Petitioners' statement of the case is adequate for purposes of framing the issues.

REASONS FOR DENYING THE WRIT

I.

THE STATE'S INABILITY TO PRODUCE NON-EXISTENT EVIDENCE DID NOT PREJUDICE PETITIONERS.

Petitioners concede that no state or federal rule of procedure requires the transcription of testimony given before a Grand Jury. Certainly no such rule exists in Illinois. *People* v. *Aughenbough,* 36 Ill. 2d 320, 233 N.E. 2d 117. Petitioners argue, however, that due to certain "bizarre circumstances" failure to record grand jury testimony of the instant burglary victim amounted to "suppression of evidence possibly favorable to petitioners" (Br. p. 6) in violation of *Brady* v. *Maryland,* 373 U.S. 83, and *Giles* v. *Maryland,* 386 U.S. 66.

The first so-called "bizarre" circumstances relied on by petitioners is that the victim, Mrs. Birdsong, testified that in addition to the currency taken from her kitchen table, a ring and transistor radio were missing from her home and yet neither item was found on the person of either petitioner (Br. p. 8). Therefore, argue petitioners, what Mrs. Birdsong told the Grand Jury about her ring and radio was critical information withheld from them by the failure to record her testimony. Far from being vital, this information was completely irrelevant to the issue of the petitioner's guilt or innocence. Due to quick police work, petitioner Guajardo was apprehended right in Mrs. Birdsong's living room. Colletti attempted a hasty retreat via the back door but was apprehended in

the yard with Mrs. Birdsong's money in his sweater pocked.* To argue that the absence of ring or radio in the possession of either petitioner suggests their innocence is to ignore the simple fact that the petitioners were caught "red-handed".

Furthermore, the absence of the ring and radio was not noted or reported until sixteen days after the robbery. In the interim, Mrs. Birdsong moved to different quarters. Therefore, the missing items could have been taken at any time before, during, or after the robbery. On cross-examination, Mrs. Birdsong conceded that the radio and ring could have been taken on a date other than the robbery. (R. 141-146)

Left in this wholly non-probative posture, the ring and radio don't appear as a "bizarre circumstance" after all.

Another "bizarre" circumstance pointed out by petitioners is the fact that no "pair of sunglasses (was) found in the living room or outside, even though a thorough search was *made*" (Br. p. 8). Mrs. Birdsong had testified at trial that one of the home-invaders was wearing a pair of sunglasses. Here petitioners simply misstate the record. No search of the outside was made (R. 197, 352); and, of course, none was necessary since they were caught in the act.

Petitioners attach significance to the fact that Mrs. Birdsong testified one of the robbers was taller than the other, while petitioners are "the same height" (Br.

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*Colletti argues that his possession of the bills and coins found in his pocket was consistent with his employment as a catering truck operator (Br. p. 8), hardly convincing in light of the absence of any such truck in the area (R. 233-39).

p. 8). This assertion also does not accurately reflect the record. The police chief testified that his records showed Colletti two inches taller than Guajardo, but that the men appear to be "about" the same height. (R. 239). Mrs. Birdsong testified that when she saw petitioners in her driveway after their arrest, one appeared to be taller than the other (R. 90-101). Thus, even if petitioners are the same height, a fact not necessarily established in the record, the most that can be said is that they didn't look that way to Mrs. Birdsong.

Petitioners' arguments regarding the victim's testimony about irrelevant matters do not support their claim that the prosecution deliberately suppressed evidence favorable to them. The mere failure to transcribe Grand Jury testimony can hardly constitute a suppression of evidence, especially when, as petitioners believe, this is done as a general practice and not selectively. The theory advanced by petitioners' exceeds the scope of the case at hand and would in essence require the police and prosecutors to take written statements from each and every prospective witness. Due Process does not dictate the mandatory imposition of such a clerical responsibility.

Respondent further contends that petitioners' almost random insertion of cases such as *Giles* v. *Maryland, supra,* and *Brady* v. *Maryland, supra,* are little more than undisguised attempts to cast an ominous overtone to a trial which in no way can be characterized as possessing analogous discovery problems.

In *Giles* the State suppressed evidence which would have been sufficient to show that the "victim" of the rape was blatantly promiscuous and had probably consented to relations with the defendants. The effect of the evidence

in *Giles* and similar cases has been such as might have produced an acquittal or substantial reduction in sentence. Clearly, that is not this case.

II.

THE STATEMENT OF PETITIONER GUAJARDO DID NOT PREJUDICE COLLETTI.

At the trial, counsel for Guajardo, on cross-examination of the police chief, elicited the information that, after his arrest, when asked what he was doing in the victim's home, Guajardo said that he was walking down the street and saw a man run out of the house, whereupon he went to see if there was any trouble.

Colletti alleges that this testimony deprived him of the right to confront the witnesses against him in violation of *Bruton* v. *United States,* 391 U.S. 123, and the Sixth Amendment. Nothing could be further from the truth.

Police Chief Kagann and Officer Zima arrived at the victim's home after receiving the report of a burglary in progress. Chief Kagann entered the house through the basement and proceeded up the inside stairs while Officer Zima went around to the back door. When Chief Kagann reached the living room he observed petitioner Guajardo standing about three feet from a television set, on top of which there was a gun (R. 162-164). Guajardo started toward the set at which time Kagann said "Freeze, police officer" (R. 165).

At the same time he heard a voice, which he recognized as Officer Zima, cry "Hold it, police officer" (R. 165).

Officer Zima testified that as he rounded the northeast corner of the house he saw Colletti running away from the building. He had only covered about 20 or 30

feet of ground when Officer Zima yelled "Hold it, police officer" (R. 313).

Thus, it is perfectly clear that if Guajardo's testimony, that he saw someone run out of the house and then went in to see what was wrong, could have had any effect on the jury, it would have been to vindicate Colletti. Colletti could not have been the man that Guajardo saw unless he had been doing his running on a treadmill. Colletti was arrested while running away from the building. His arrest was heard by Chief Kagann while he was in the living room with Guajardo. If the testimony assigned as error was to be believed, there had to be a second man running from the building. This testimony was to the advantage of Colletti. He obviously could not have been the person referred to. If any cause was prejudiced it was that of the People.

The Appellate Court correctly perceived that Colletti could not have been the person referred to in Guajardo's testimony, and that the fact alone rendered *Bruton* v. *United States,* 391 U.S. 123, inapplicable. For the same reason, *DeLuna* v. *United States,* 308 F. 2d 140 (5th Cir. 1962), relied on by petitioners, does not control here.

CONCLUSION

For the reasons stated above, Respondent herein requests that the Petition for Certiorari be denied.

Respectfully submitted,

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PETITIONERS' REPLY TO THE STATE'S ARGUMENT.

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PETITIONERS' REPLY TO THE STATE'S ARGUMENT.

1.

The prosecutor suppressed evidence possibly favorable to Petitioners.

First, we point out that the Respondent's argument makes certain factual assertions not borne out by the Record. For example, Respondent states that petitioner Colletti was arrested with the victim's "money in his sweater pocket." (State's Br. 4). Such is not evidence. The victim never identified any money taken from Colletti

as being hers. She was not asked to identify the money. Nor was Colletti found "red-handed," as the State argued. He was away from the home, in an area where construction men were working. Thus, Colletti was neither caught "red-handed", nor was any money belonging to the victim found on his person.

Uniquely enough, Respondent does not deny that the State's Attorney made it a deliberate and fixed policy not to preserve grand jury testimony. However, if the motive of the State's Attorney is to prevent use of grand jury testimony for purposes of possible impeachment, then, a showing has been made of suppression of evidence and the impeachment of Mrs. Birdsong, the victim, was something less than it might have been. The jury was deliberating the case upwards of eight hours, and certainly it cannot be said that the case was proven without any doubt.

We submit the practice of the State's Attorney of DuPage County, Illinois is dangerous to the fair administration of criminal justice.

2.

Petitioner Colletti was prejudiced by the introduction into evidence of his co-defendant's statements, made outside his presence.

Bruton v. *United States,* 391 U.S. 123, stands squarely for the proposition that an out-of-court statement made by one defendant may not be introduced against another.

At first, the trial judge sustained Colletti's objections to the statement of Guajardo. Later, the trial judge changed his ruling and allowed the evidence to go in without any limitation as to Colletti. The Appellate Court ruled that the "evidence was improperly admitted" (App.

A. p. 3a), but determined that Colletti could not be prejudiced. The Appellate Court also stated as its reason that it was not the State who introduced the prejudicial evidence, but the co-defendant, Guajardo. It matters little to a defendant who is prejudiced in his right to a fair trial from which source the contaminated evidence comes.

If *Bruton* is to have any viability, it should be applied in this case. The argument Respondent makes to the effect that Colletti *might not* have been the person referred to in Guajardo's out-of-court statement is patent nonsense.

CONCLUSION.

For the reasons set out, certiorari should be granted.

Respectfully submitted,

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